IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

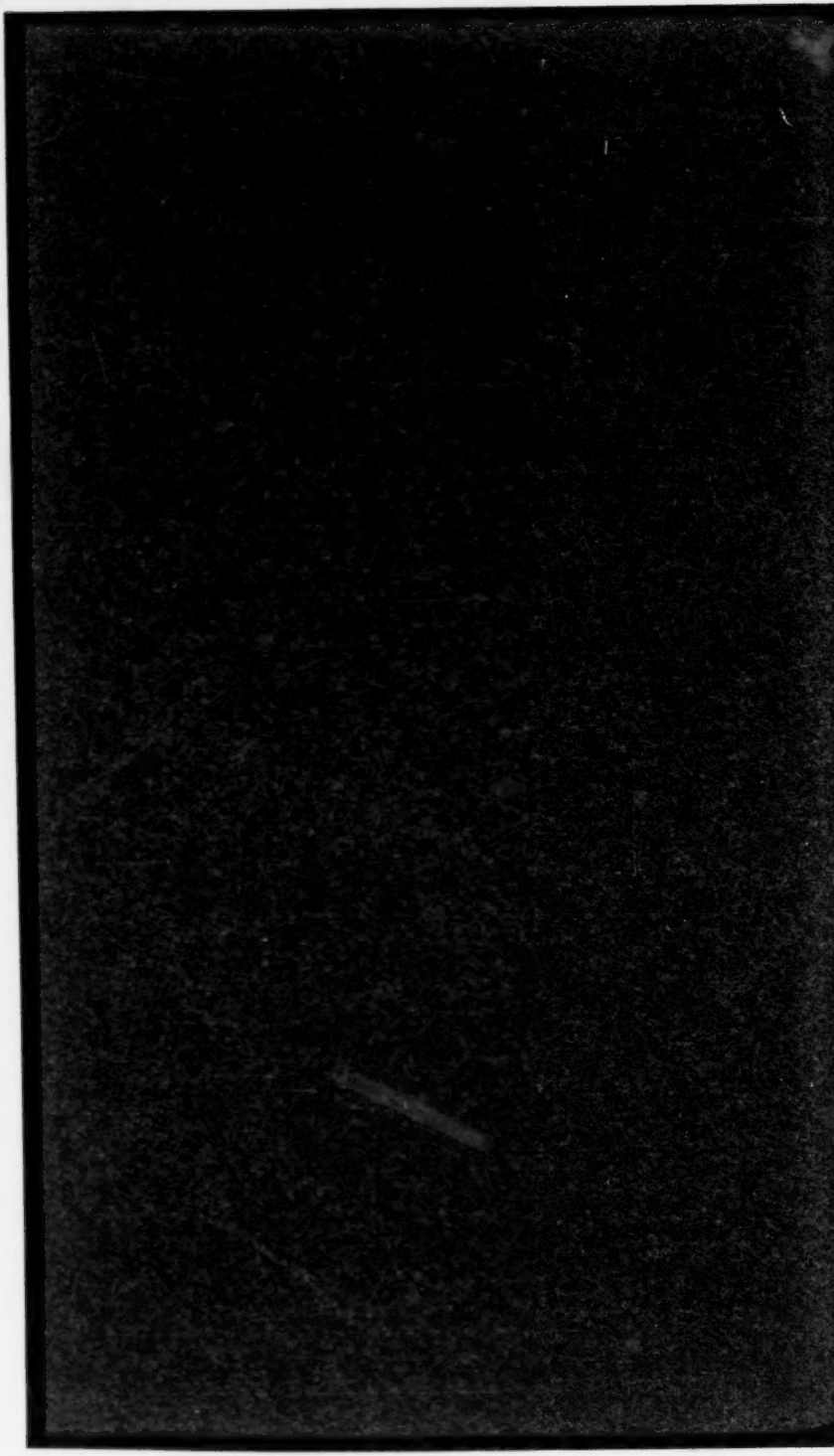
vs.

THE NEW RIVER COMPANY, NEW RIVER COAL COMPANY, STUART COLLIERY COMPANY, DUNLOUP COAL & COKE COMPANY, BRADLEY COAL & COKE COMPANY, MACCORKLE COAL & COKE COMPANY AND CRANBERRY FUEL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1923

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants,

v.

THE NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, DUNNLOOP COAL & COKE COMPANY, BECKLEY COAL & COKE COMPANY, MABSCOTT COAL & COKE COMPANY, AND CRANBERRY FUEL COMPANY } No. 627

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES

STATEMENT

Six complaints were brought before the Interstate Commerce Commission which were disposed of by the following order,[1] viz (Tr. 43):

> It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

[1] This order of dismissal is preceded by the following recital:

These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

The appellee companies then filed the bill to review these proceedings and prayed for an order contrary to that entered by the Commission and for appropriate injunctions to make such contrary order of the court effective.

Circuit Judge Waddill and District Judge McClintic concurring (Tr. 53) and Circuit Judge Woods dissenting (Tr. 59), the District Court entered the final decree (Tr. 50). With a full finding of facts embodied therein, the decree adjudged (Tr. 53):

> 1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby rule 4 of Circular CS–31, revised, is promulgated and put into effect and authorized is without warrant in law and is null and void.
>
> 2. That said order and said rule 4 of Circular CS–31, revised, promulgated, and authorized thereby are hereby set aside and annulled.
>
> 3. That the United States of America, the Interstate Commerce Commission, and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922. of the Interstate Commerce Commission, and of rule 4 of Circular CS–31, revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

THE FACTS.

The undisputed material facts may be stated within narrow compass. In Fayette and Raleigh Counties, West Virginia, are located the New River Coal fields, which are served by the Chesapeake & Ohio and Virginian Railway companies. Those mines which are served by both companies are known as "joint mines" and those which are served by only one company are known as "local mines" (Tr. 54). The New River Company (which owns all of the stock of the other appellees) (Tr. 2) and its six subsidiaries are "joint mines." In those fields are also "local mines" who are interested (Tr. 26; see also No. 628).

On December 26, 1917, by proclamation, the President took possession and assumed control and operation of the railroads (40 Stat. 1733). Through his car service section, the Director General, in rating the coal mines other than anthracite in periods of car shortage, promulgated rule 4 (formerly rule 2) of Circular CS–31, viz (Tr. 19, 23):

> Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

The practical operation of the rule is as follows (Tr. 29):

Mine A is a joint mine served by the Chesapeake & Ohio and Virginian; mine B is local to the Chesapeake

& Ohio, while mine C is local to the Virginian. Each has a daily rating of 20 cars. On a certain day the Virginian has a 70 per cent car supply, and the Chesapeake & Ohio a 50 per cent car supply. Mine A divides its order between the Chesapeake & Ohio and the Virginian; that is, it orders 10 cars from each carrier. Local mines B and C each orders 20 cars. As the car supply of the Chesapeake & Ohio is 50 per cent it would furnish mine A with 5 cars, while the Virginian, with a 70 per cent car supply, would furnish 7 cars, or a total of 12 cars from both roads. Mine B would receive 10 cars from the Chesapeake & Ohio, and mine C 14 cars from the Virginian.

This rule continued in force and effect to the end of Federal Control, February 29, 1920, and thereafter under the provisions of the Transportation Act[2] and the recommendation of the Commission by the circular dated March 2, 1920, "that the

[2] Section 208, which terminated Federal Control, provides (41 Stat. 464):

Sec. 208. (*a*) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

(*b*) All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

carriers, both those defendant herein and all others subject to the interstate commerce act, continue in force the said Circular CS–31, revised, until such time as the experience of the carriers or the commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines; and in accordance with and in compliance with said action of the commission, the rules of said circular were continued in force" by the Chesapeake & Ohio and Virginian Railway companies (Tr. 8).

Subsequently, on July 8, 1920, the two carriers named applied for permission to abrogate rule 4, the application was denied and rule 4 was continued in effect (Tr. 8). On July 11, 1921, formal complaints were filed assailing rule 4 and after hearing the Commission on June 21, 1921 (Tr. 25), found that rule 4 was unjust, unreasonable, and unduly prejudicial (Tr. 25, 9). The previous rule, always referred to as the "Illinois Rule,"[3] was recommended by the Commission without any formal order directing that the same shall be put in force (Tr. 25–32).

[3] The District Court said (Tr. 55; 293 Fed. Rep. 462):

"The history of this question appears from the record in this case to be as follows:

"For a period of years prior to the taking of Federal control of railroads, cars were distributed in time of car shortage, to joint mines in the New River fields, by each of the carriers, by what will, for convenience, be referred to as the New River rule; that is, there was no distinction between joint mines and local mines, and cars were distributed to joint mines, according to their proportionate share of the available car supply in that region, as determined by the rated capacity of the shipper, and without reference to, or inquiry into, the car supply furnished by any other railway. The only limitation placed on the mine was that these orders for cars, based on its rating, should not result in a car supply greater than the capacity of the mines to ship. If, in practice, the orders were so placed as to exceed

Subsequently, the proceedings were reopened and consolidated with other proceedings relating to mines and carriers located in Illinois and Indiana and after further hearing, the Commission, on December 11, 1922, filed its report and entered the order dismissing outright all of the several complaints. The Commission said (Tr. 41):

> The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS–31, revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the *Fairmont case*, based upon a mistaken adherence to and extension of the decision in the *Illinois case*, are reversed.

As a result of the order dismissing the several complaints, rule 4 of Circular CS–31, revised, was allowed to stand.

The bill of complaint attacks not only the order of dismissal but rule 4 as well.

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the capacity of the mine to ship, the penalty rule was provided, in order to limit the car supply for its succeeding days, and ultimately, to be reflected in the rated capacity of the mine for the succeeding months.

"This rule here described has sometimes been called 'the two hundred per cent rule.'

"By the decision of the Interstate Commerce Commission in the Illinois case (In re Irregularities in Mine Ratings, 25 I. C. C. 286), the commission required that the carrier shall furnish daily to the operators a statement of the available car supply for the following day. Under the car service rules appended to the bill in this record, the mines place their orders at 4 p. m. on each day for the following day. Where there are two carriers, this rule, known as the Illinois rule, permits the joint mine to order from each carrier, such number of cars as it may need, based on its rated capacity, not to exceed 75 per cent of such rated capacity. This is sometimes called the 'one hundred and fifty per cent rule.' "

ARGUMENT

I

The Order Directed No Affirmative Relief, it is Purely Negative, and One Which the District Court Should Not Have Reviewed

The bill of complaint as amended and supplemental bill in this case appears to have been modeled after the bills in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp* and *Eagle White Lead Co.* v. *Interstate Commerce Commission*, 225 U. S. 302. In those cases the railroad companies were also named as defendants in order that injunctions may be prayed against them. The order of dismissal of the Commission in the instant case is certainly identical in form with the orders of dismissal of the Commission in those cases.

In the *Procter & Gamble case*, as in this case, the order of dismissal allowed the rule to stand as binding upon both carriers and shipper, and the rule and not the order of dismissal was made the foundation of the bills in equity. Thus, Mr. Chief Justice White, in stating the form of the action, said (225 U. S. 287):

> In February, 1911, the Procter & Gamble Company filed a petition in the Commerce Court of the United States making defendants the United States, the Interstate Commerce Commission, and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of

> the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had resulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission, and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin, wherein it was also charged that the order of the Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of * * * said demurrage rules."

In that case, as in this case, the defendant carriers answered the bill. The United States moved to dismiss for want of jurisdiction (225 U. S. 289).

The Commerce Court took jurisdiction of the controversy, held that the Commission had rightly decided and then entered an order dismissing the petition on the merits.

On the appeal of Procter & Gamble, this Court reversed the judgment of the Commerce Court and sustained the motion of the United States to dismiss for want of jurisdiction on the ground that the order was negative. The Supreme Court referred to the decision of the Commerce Court which had held that the order of dismissal of the Commission was *in effect* the equivalent of an order of the Com-

mission granting affirmative relief, thus (225 U. S. 290):

> In disposing of the case, the court considered it in a two-fold aspect—first, as to its jurisdiction; and, second, as to the merits of the case. On the first subject it held, *a*, that it had jurisdiction of the cause, and that the refusal of the Interstate Commerce Commission to afford relief to the Procter & Gamble Company was, for the purposes of jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief, and, *b*, as a corollary of this power it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted.

In *Lehigh Valley Railroad Co.* v. *United States*, 243 U. S. 412, 414, the Act of August 24, 1912 (c. 390, sec. 11, 37 Stat. 560, 566), known as the Panama Canal Act, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; the Commission was authorized to determine questions of fact as to such competition. On application of carriers the Commission was authorized to extend the time for the relinquishment of the ownership if the extension would not exclude or reduce competition on the water route. Lehigh Valley filed a petition praying for a hearing as to whether the services of a steamship line owned by it would be in violation of the act and for an extension of time. The petition was dismissed and the statute became abso-

lute against the company (33 I. C. C. 699, 706, 716; 37 I. C. C. 77). The bill was filed to prevent the enforcement of the order of the Commission. The District Court denied the injunction and dismissed the bill (234 Fed Rep. 682). In holding that the District Court was without jurisdiction over the report and order of the Commission, this Court said (243 U. S. 414):

> Three judges sitting in the District Court denied the injunction asked and dismissed the bill (234 Fed. Rep. 682). Although they proceeded to discuss the merits of the case they intimated at the outset a strong doubt whether in any event an injunction could be granted. If this doubt was well founded there is nothing more to be said, *since the ground of jurisdiction is gone.* * * *
>
> The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, 293. (Italics ours.)

The dissenting opinion of Circuit Judge Woods, who presided on the first hearing, conforms to the foregoing opinions; thus (Tr. 60):

> There was never any order or even final determination of the commission to put into effect any rule or to interfere with rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered, and changed; but all this was done in one consolidated proceeding, which was never ended until the commission made the order above quoted. This last order was a final dismissal of the com-

plaints and a refusal to take any action with respect to rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court. *Procter & Gamble* v. *United States*, 225 U. S. 282. The action of the Interstate Commerce Commission in the case cited had more the semblance of affirmative action than in this, for there Procter & Gamble asked the revocation or modification of a rule expressly approved by the commission, while here, in a continuous proceeding, the commission merely reached the ultimate conclusion that it would not interfere with an existing rule of the railroads. I therefore think the court had no jurisdiction whatever to enjoin the railroads from operating under rule 4 as a rule established by affirmative action of the Interstate Commerce Commission.

The only difference between the orders of dismissal in the *Procter & Gamble Case* and the instant case is that the former case assailed rule 9 of the demurrage rules and this case assails rule 4 of the coal car distribution rules. In all other respects, except as pointed out by Judge Woods, they are similar in form, substance, and effect.

Either the decree of the District Court must be reversed with directions that the suit shall be dismissed or the opinion and judgment of this Court in the *Procter & Gamble case* must be overruled.[4] There

[4] The *Procter & Gamble case* has since been cited with approval or distinguished (but never overrruled) in the following cases: *Hooker* v. *Knapp*, 225 U. S. 302, 305; *United States*, v. *Baltimore & Ohio*, 225, U. S. 306, 323; *Atchison, Topeka & Santa Fe* v. *United States* 231 U. S. 736; *Tap Line cases*, 234 U. S. 1, 22; *United States* v. *Illinois Central*, 244 U. S. 82, 87; *Lehigh Valley* v. *United States*, 243 U. S. 412,

190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683; *Hall* v. *Payne*, 254 U. S. 343; or to be used as a writ of error, *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522.

In the *Waste Merchants case* it was held that courts may not undertake to compel the Commission to decide a certain way a case over which its jurisdiction was not questioned. In the instant case the jurisdiction of the Commission is not only conceded but it was invoked by the same parties who lost their case and who subsequently filed the bill of complaint. As in the *Waste Merchants case*, they now seek by mandatory injunction to gain what they lost. Effective regulation of the distribution of cars to coal mines in times of car shortage will not result from such divided authority.

III

The Subject of Mine Ratings Is Within the Jurisdiction of the Commission and Its Findings of Fact Are Conclusive

Section 1 of the Interstate Commerce Act was amended by Section 402 of the Transportation Act (41 Stat. 476), which provided by paragraph (12) thereof as follows:

> (12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for

> such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.

As shortly stated by the District Court, "The question which comes up for decision in this case is whether a joint mine shall be allowed to order such cars as it may need, according to its rated capacity as fixed under the rule, from each railroad, or shall it be allowed only to order such number of cars from both carriers as it would be allowed to order from one carrier" (Tr. 55; 293 Fed. Rep. 462).

The history of mine rating and car distribution may be found in previous reports of the Commission.

R. R. Com. of Ohio et al. v. *M. V. Ry. Co.*, 12 I. C. C. 398.

Powhatan Coal & Coke Co. v. *N. & W. Ry. Co. et al.*, 13 I. C. C. 69.

Royal Coal & Coke Co. et al. v. *Southern Ry. Co.*, 13 I. C. C. 440.

Traer v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C. 451.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C. 86.

Hillsdale Coal & Coke Co. v. *P. R. R. Co.*, 19 I. C. C. 356.

In re Irregularities in Mine Ratings, 25 I. C. C. 286.

Without exception this Court has vigorously sustained the jurisdiction and authority of the Com-

mission over this all-important subject, and if there is any one question above another which the railroad companies, the Commission, the courts, and the entire commercial world had all regarded as conclusively settled, it is that the Interstate Commerce Commission was clothed with power to regulate the distribution of cars to coal mines in times of car shortage and that its orders were final.

> *Interstate Commerce Commission* v. *Illinois Central*, 215 U. S. 452.
>
> *Interstate Commerce Commission* v. *Chicago & Alton*, 215 U. S. 479.
>
> *Baltimore & Ohio* v. *Pitcairn Coal Co.*, 215 U. S. 481.
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> *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.
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> *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247.
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> *Morrisdale Coal Co.* v. *Pennsylvania Railroad Co.*, 230 U. S. 304.
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> *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U. S. 121.
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> *Pennsylvania Railroad Co.* v. *Clark Coal Co.*, 238 U. S. 456.
>
> *Pennsylvania Railroad Co.* v. *Stineman Coal Co.*, 242 U. S. 298.
>
> *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43.

In its opinion the learned District Court said (Tr. 57; 293 Fed. Rep. 464):

> The facts developed by the evidence show very large expenditures made by the plaintiffs for the purpose of shipping coal by the two

carriers. It is also shown that the shortage of cars on each carrier continues most of the time, and that the right to ship coal by each carrier is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had access to the lines of two carriers than would be thought of for similar mines with access only to the line of one carrier. When there is any real market for coal, car shortage has always existed, and, so far as can be foreseen, will always exist. This case would not have arisen if each carrier had always on hand a sufficient supply of cars to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location giving such access, and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof. From the adjudged cases, it is plainly to be seen that the Interstate Commerce Commission has no authority to exercise its powers so arbitrarily as virtually to

transcend such authority conferred, although it may be not technically doing so. *Procter & Gamble Co.* v. *United States, supra.*

A so-called regulation, which destroys at least 30 per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designated and developed, by the large extra expenditures of money as shown by the evidence in this cause. Of course, a commercial advantage will accrue to the joint mine over the local mine by the abrogation of rule 4, but in our opinion that advantage constitutionally belongs to it by reason of its location, and one that the Interstate Commerce Commission can not order the carriers to take away from it, and one of which the carrier can not legally deprive it.

In so holding the learned District Court erred. The doctrine announced by Mr. Justice Holmes in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, "The law does not attempt to equalize fortune, opportunities, or abilities," is wholly inapplicable. There the shippers, as owners of certain of the transportation facilities located at convenient points or gateways and who were performing part of the transportation service, were receiving allowances from the carriers. Here the opposite situation prevails. These coals in the earth have fixed and unchangeable locations. They must be discovered and

transportation facilities must be extended thereto before mines may be opened and the coals made useful. In order to produce coal, mine development and transportation facilities must go to that coal however inconveniently located it may be.

The Court takes judicial notice that ordinarily coal is produced in mountainous or rolling regions where mine development and railroad construction are highly costly. Without railroads and transportation facilities, far inland mines are utterly useless. Here we have the announced doctrine by a court of equity that because one coal mine with a daily capacity of 60 cars happens to be located at a point which is served by two or three carriers, it is entitled to twice or three times as many more cars as another mine of the same capacity located but a short distance away on the line of a single carrier.

The learned District Court lost sight of the fact that the production of coal and the distribution thereof is the paramount question. The carrier is not concerned, as in time of car shortage its supply is consumed in any case. Obviously the doctrine announced by the learned District Court would give practically the entire production to those mines which are located on two or more carriers as against other mines whose production is equally important but which are located on the lines of single carriers. As in the instant case, in order to acquire preference and discrimination short lines or spurs need only be constructed to double or triple the car supply of one

mine over another. It is conceivable that many mines are so located as that but one railroad only may be built thereto. Is such a mine to transact business merely on "left over" cars of other mines that may be served by two or more carriers? The doctrine that the "law does not attempt to equalize fortune, opportunities, or abilities" should not deprive a coal mine of its *pro rata* car supply based on its capacity because it happens to be located only on a single railroad. In determining the subject but two elements are to be considered, i. e., the capacities of the respective mines and the number of cars available for all mines according to capacities. The fact that a mine may be served by one carrier or six should not be a test for the distribution of the cars, as it is obvious that a distribution on any such basis would be wholly injust and inequitable.

Directly in point is *Seaboard Air Line Railway* v. *United States*, 254 U. S. 57. In that case this Court held that discrimination in the absorption of switching charges in the Richmond Switching District on cars originating at points served by competitive carriers could not be sustained as against the nonabsorption of such charges on cars originating at noncompetitive points. Holding that the question was foreclosed by the findings of fact of the Commission this Court affirmed the decree of the District Court dismissing the bill. In that case it was held that a shippers hould not be favored because it was locatedat a point which was served by two carriers as against a

shipper located at another point which was served by a single carrier. That case and the instant case are *on all fours.* In that case this Court held that the order of the Commission was final.

On this branch of the case the language of Circuit Judge Woods, dissenting, and the cases cited by him are pertinent: (Tr. 60; 293 Fed. Rep. 467).

> Even, however, if rule 4 had been adopted and put into effect by the Interstate Commerce Commission, it seems to me perfectly clear that this court has no power to change it. It is apparent from the above statement that the Interstate Commerce Commission has devoted much time and care to the consideration of the justness and reasonableness of the rule. To say the least, it can not be doubted that the whole matter is debatable and that there are very strong reasons in favor of rule 4 as distinguished from the 150 per cent rule claimed by the complainants. Even if this court entertains the opinion that the action of the commission was unwise and improper, that affords no ground to say that a prima facie case for an injunction has been made out. (*Interstate Commerce Commission* v. *Illinois Cent. R. R.*, 215 U. S. 452, 478; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62;

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No. 627.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

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Of Counsel.

MARCH, 1924.

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In the Supreme Court of the United States

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

INTRODUCTORY.

This is an appeal by the United States and the Interstate Commerce Commission, hereafter referred to as the Commission, from a final decree of the United States District Court for the Southern District of West Virginia.[1] The decree annulled and set aside an order of the Commission which the court held "promulgated and put into effect and authorized a certain rule, known as Rule 4 of Circular CS-31, Revised," relating to the distribution of cars during periods of car shortage, to bituminous

[1] Hon. Charles A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and the Hon. George W. McClintic, District Judge, sitting as a special thre -judge court under the provisions of the Urgent Deficiencies Act, October 22, 1913, c. 32; 38 Stat. 208, 219, 220

coal mines, and more particularly to joint mines,[2] by the Chesapeake & Ohio Railway Company and the Virginian Railway Company; and perpetually enjoined the United States, the Commission, and the two railroad companies from "restricting * * * the transportation rights" of appellees, who are operators of certain joint mines, "by or through any other order or rule to the same effect."

Rule 4 reads as follows:

> Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

The statement of the case will, perhaps, be somewhat clearer if this rule is explained at the outset. To understand the meaning of the rule, it is necessary to consider the other rules, which, together with Rule 4, provide for the distribution of cars for coal loading when the available supply is not sufficient to meet all requirements. These rules are set forth in full as an appendix to the amended bill. (Rec. p. 19.) Briefly, it may be said that they provide for a *pro rata* distribution each day between mines served by the carrier of the cars available for coal loading on the basis of the "rating" of each mine. The rules provide how the ratings, which are changed each month, shall be calculated. The rating of a local mine for a given month is determined by taking the

[2] A "joint" mine is one served by two or more carriers. A mine served by only one carrier is called a "local" mine.

total tonnage shipped by the mine during the preceding month over the carrier serving it, dividing this tonnage by the number of hours worked in producing it, and multiplying the quotient by the number of hours in the recognized work day of the particular mine. The result is the "daily rating" of the local mine, stated in tons. It is generally reduced to terms of cars by dividing the number of tons by 50, the standard car having a carrying capacity of 50 tons. The daily rating of a local mine over the road which serves it is thus identical with its daily capacity to produce coal. All coal it produces must of necessity be shipped over that road.

The rating of a joint mine is obtained by first determining its daily capacity to produce coal, which is calculated in the way that the daily rating of a local mine is determined, except that in case of a joint mine its shipments over all carriers serving it are considered. The figure thus ascertained is called the "gross daily rating" of the joint mine instead of the "daily rating" in recognition of the fact that it does not represent the capacity of such a mine to ship over each line serving it on days when it uses more than one line, but, on the contrary, represents its total daily capacity to ship over all lines which serve it. The rules provide that when a mine orders less than its rating, cars are to be distributed to it on the basis of its orders; and provide (Rule 4), as we have shown above, that the combined orders of a joint mine for cars from all roads serving it can not exceed the *gross* daily rating of the mine. Thus

Rule 4 in effect provides a flexible "daily rating" for a joint mine *over each carrier which serves it.* The daily rating over each line is dependent upon the daily rating over the other line or lines, and the combined daily ratings are equal to the *gross* daily rating.

An illustration will make this clear. A joint mine, with a *gross* daily rating of 5,000 tons or 100 cars, is served by two railroads "A" and "B." On a given day "A" has cars available for distribution which will meet only 60 per cent of the mine's requirements for that day; "B" has a 40 per cent car supply. The joint mine could order its entire *gross* daily rating, 100 cars, from "A" and receive as its distributive share 60 cars, in which case it could receive no cars from "B"; or it could order 50 cars from "A" and 50 cars from "B," and receive 30 cars from "A" and 20 cars from "B"; or order its entire *gross* daily rating from "B" and receive from "B" 40 cars and no cars from "A."

The car distribution rules we have outlined were established during Federal control. Prior to that time the rules of the various carriers differed widely. After the expiration of the period of Federal control the Commission issued a notice, dated March 2, 1920, to carriers and shippers, in which it recommended that until experience and further study demonstrated that other rules would be more effective and beneficial, the uniform rules established during Federal control be continued in effect. (Rec. p. 36.) These rules were continued in effect by carriers gen-

erally, including the Chesapeake & Ohio and the Virginian. On July 8, 1920, these two carriers asked the Commission for permission to discontinue Rule 4 and substitute for it a rule generally called the 150 per cent rule, which the Commission had found in 1912 to be a reasonable rule for the Illinois Central Railroad Company, *In Re Irregularities in Mine Ratings,* 25 I. C. C. 295, but which had never been followed by the railroads generally, or by the Chesapeake & Ohio or the Virginian. (Rec. pp. 26, 27, 35.)

Under the 150 per cent rule a joint mine is permitted to order 100 per cent of its gross daily rating from either line serving it and to receive, on that basis, its *pro rata* share of that line's available cars. If it does this it is not entitled to any cars from the other lines serving it. In this respect it does not differ from the 100 per cent rule. However, under the 150 per cent rule, when a joint mine, served by two carriers, orders cars from both on the same day, its rating over each road is 75 per cent of its gross daily rating, and its combined ratings over the two lines are 150 per cent of its gross daily rating. The joint mine may obtain its *pro rata* share of cars from each carrier on the basis of 75 per cent of its gross daily rating, subject to the limitation that it can not actually receive from both lines together more than 100 per cent of its gross daily rating.

The Commission declined to give "informally" the permission, which the Chesapeake & Ohio and Virginian had sought, to substitute the 150 per cent rule for the 100 per cent rule.

PROCEEDINGS BEFORE THE COMMISSION.

Thereupon, on January 11, 1921, appellees filed separate complaints with the Commission against the Chesapeake & Ohio and the Virginian attacking Rule 4 as unjust and unreasonable, and unduly prejudicial to joint mines and unduly preferential of local mines. Appellees own and operate 11 coal mines in Fayette and Raleigh Counties, West Virginia, in the so-called New River District. Each of appellees' mines is located on either the Virginian or the Chesapeake & Ohio, but is served by both carriers as a result of certain trackage and other arrangements. (Rec. pp. 28, 29.) There are numerous coal mines in the New River District, other than those of appellees; some are joint mines, others are served only by the Chesapeake & Ohio, and still others are served only by the Virginian.

Appellees' complaints before the Commission were docketed as Nos. 12083 and 12084. Certain operators of local mines in the New River District intervened in support of the reasonableness, etc., of Rule 4. The complaints were consolidated with each other and with still other similar complaints, were assigned to Division 5 of the Commission and duly heard, briefed and argued. On June 21, 1921, Division 5 issued its report, finding (Rec. pp. 25, 31):

> * * * rule 4 of Circular CS–31, Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per

> cent of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois Case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating, * * *.

It was said in the report: (Rec. p. 32)

> We shall expect * * * that defendants will promptly amend their car service rules so as to conform with our findings * * *.

No order was entered, but the Chesapeake & Ohio and the Virginian amended their rules to conform with the findings in the report. Subsequently, on petition of the operators of local mines who had intervened in Nos. 12083 and 12084, the case was reopened for further argument and was reconsidered by the full Commission, which issued its report, on December 11, 1922 (Rec. p. 32), reversing the former findings of Division 5 in Nos. 12083 and 12084 and finding that Rule 4 was not unreasonable or unduly prejudicial. On the same day the Commission entered an order dismissing the complaints in Nos. 12083 and 12084, this being the first order to be

entered in the proceeding. We quote the order, omitting the formal parts: (Rec. p. 43)

> These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> *It is ordered*, That the complaints in these proceedings be, and they are hereby, dismissed.

In its report upon reargument, the Commission said in part (Rec. pp. 40, 41):

> Upon the present record and in the light of instant conditions we are not disposed to extend the principle laid down in the *Illinois case*, which was intended as a limitation upon the practice of the respondent in that proceeding. Ten years have elapsed since our decision in that case, and we now have a considerable experience with the results of the practice inaugurated by the carriers following our determination, as well as a broader record. We have indicated in proceedings of this character that the principle of *stare decisis* has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time. (*Hillside Coal & Coke Co.* v. *P. R. C. Co.*, 19 I. C. C. 356, 361.)

Indeed, in passing upon the mine-rating feature of the *Illinois case*, we indicated in the report at page 295, that we did so only upon the facts and under the conditions there presented, and that our determination in approving the basis presented was not to be understood as indicating approval of its adoption in places where it would not suitably and properly meet the conditions, or where it would be objectionable to the great majority of those affected thereby. In important particulars the present record presents new aspects to us. There have been important developments in the coal industry, not then in contemplation. The superior advantages of the joint mine over its local competitor, in part flowing from the decision in the *Illinois case*, have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by but one. A duplication of trackage and of trackage rights has followed in numerous instances. The practice indicated in the *Illinois case* seems, in certain instances, to result in a waste of car-days which in view of the effects of recent and present car shortages should be avoided. There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers. Whatever tends to inflate the nominal mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest.

Following the report and order of the Commission upon reargument the Chesapeake & Ohio notified appellees that it would again put Rule 4 into effect on February 10, 1923; and the Virginian served notice that it would take similar action on February 1, 1923.

PROCEEDINGS IN THE DISTRICT COURT.

After receiving these notices that the carriers proposed to reinstate Rule 4, appellees filed their bill of complaint in the District Court. The bill was later amended and since we are concerned only with the bill as amended, we will refer to it as the "bill." The United States, the Commission, the Chesapeake & Ohio and the Virginian were named as defendants. It was prayed that the "decision, ruling and order of December 11, 1922" of the Commission be set aside and annulled and that the United States, the Commission, and the defendant carriers be enjoined from enforcing or applying Rule 4, and from restricting transportation service to appellees by any similar rule. (Rec. pp. 1, 18.)

The bill does not allege that appellees had been denied a fair hearing, or that the procedure before the Commission was irregular, or that the Commission's action was not supported by the evidence. The ground upon which the Commission's action is challenged seems to be that Rule 4 deprives appellees of their "legal rights" to obtain a fair share of available cars. Paragraph XXI of the bill reads as follows: (Rec. p. 14).

> Said decision, ruling, and order of the Interstate Commerce Commission of De-

cember 11, 1922, and said Rule 4 put into effect by the defendant carriers in compliance therewith, constitutes an encroachment upon and a curtailment and denial of the legal right of your complainants and each of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property rights as a common carrier to serve your complainants as such common carrier and deprives your complainants, and each of them, of their property and legal rights without due process of law and of the equal protection of the laws assured by the constitutions and laws of Virginia, of West Virginia, and of the United States.

and it is said in paragraph XXVI: (Rec. p. 16)

It is a common law, statutory and property right of each of your complainants to have goods which it desires to have shipped by a common carrier in interstate commerce accepted and received for transportation without discrimination as to transportation and car supply between it and other shippers desiring to have similar goods shipped by the same carrier and there is a reciprocal legal duty and obligation on the carrier, regardless of what shipments the shipper may have made of other goods over another competing road, to receive and ship the goods offered by a shipper on a parity with other parties so offering goods to it for shipment and without discrimination between parties so tendering

> such shipments; if your complainants are deprived of the transportation rights to which they are entitled their investments and property in the mines owned by them and which are dependent on such transportation will be lost or seriously impaired.

The bill also alleges that the Commission's action is invalid in that it authorizes and requires the defendant carriers to agree and act in combination one with the other in furnishing transportation to a joint mine, in violation of the laws against the restraint of trade; and alleges further that the Commission's action is invalid in that it will result in a discrimination between shippers of coal served by two carriers, and shippers of other commodities similarly served, because shippers of such other commodities "enjoy the right" to ship over each carrier on a parity with other shippers offering similar commodities for shipment to that carrier regardless of shipments which they have made over the other carrier. (Rec. p. 15.)

The United States filed motions to dismiss the bill, alleging as grounds: (1) that the Commission's order was negative and therefore the court was without jurisdiction to review it, and (2) that the bill was wanting in equity. (Rec. pp. 44, 45.) The Commission filed a motion to dismiss, alleging like grounds. (Rec. p. 46.) The Chesapeake & Ohio and the Virginian filed answers to the bill. However, these defendants did not join in this appeal and their answers are not included in the record. The Slab

Fork Coal Company and numerous other companies, which operate local mines in the New River District, served by the Chesapeake & Ohio or the Virginian, and which had been intervening parties in the proceedings before the Commission, intervened, filed a motion to dismiss, and later filed an answer. These companies have perfected a separate appeal and the record in that appeal includes their pleadings. This record does not.

On January 28, 1923, a temporary restraining order was entered. (Rec. pp. 47, 48.) On March 20, 1923, the cause came on for final hearing and on August 10, 1923, the district court, Judge Woods dissenting, entered its final order and decree which reads, in part, as follows: (Rec. pp. 50, 52)

> It is ordered, adjudged and decreed as follows:
>
> 1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby rule 4 of Circular CS–31, revised, is promulgated and put into effect and authorized is without warrant in law and is null and void.
>
> 2. That said order and said rule 4 of Circular CS–31, revised, promulgated, and authorized thereby are hereby set aside and annulled.
>
> 3. That the United States of America, the Interstate Commerce Commission and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of rule 4 of Circular

CS–31, revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

An opinion was filed, from which we quote (Rec. p. 57):

> The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among 2 or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.
>
> From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.
>
> *Procter & Gamble Co.* v. *United States, supra.*
>
> A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose

> for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

The court did not say what rule of car distribution would meet the requirements of the law or what the requirements of the law were, except in so far as they are set forth in the language quoted above. Judge Woods filed a dissenting opinion. (Rec. p. 59.)

The United States and the Commission announced that they would stand on their motions to dismiss, and took a direct appeal to this court.

ASSIGNMENTS OF ERROR

The assignments of error are, in effect, that the court erred in holding that the Commission's action was affirmative and subject to review; and in holding that the Commission was without power to require the carriers to establish rule 4. (Rec. p. 62.)

ARGUMENT.

1. THE COMMISSION DID NOT GRANT AFFIRMATIVE RELIEF, AND ITS ACTION, THEREFORE, IS NOT SUBJECT TO REVIEW.

If the Commission denies affirmative relief sought, and does not base such denial upon a mistaken view that it has no jurisdiction to grant the relief, there can be no judicial review of the Commission's action. *Procter & Gamble* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *B. & O. R. R. Co. et al.* v. *United States et al.,* decided by this court March 3, 1924. The court will not inter-

fere and grant the relief which the Commission, in the exercise of its jurisdiction, has denied.

On July 11, 1921, when appellees filed their complaints before the Commission, Rule 4 was in force on the Chesapeake & Ohio and the Virginian. Division 5 of the Commission found that Rule 4 was unreasonable and discriminatory, found that the 150 per cent rule was a reasonable rule, and stated that defendants would be expected to conform their rules to the findings. No order was entered at that time. The railway companies amended their rules by substituting the 150 per cent rule for Rule 4. Upon petition of the local mines, who were parties by intervention, the case was reopened for further argument, after which the full Commission reversed the decision of Division 5, and found that Rule 4 was not unreasonable or unduly prejudicial. The Commission then entered an order, the first which was entered during the course of the proceeding, dismissing the complaints which appellees had brought attacking the reasonableness of Rule 4.

Speaking of this feature of the case, Judge Woods said in his dissenting opinion (Rec. p. 60):

> There was never any order or even final determination of the Commission to put into effect any rule or to interfere with rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered, and changed; but all this was done in one consolidated proceeding, which was never ended until the Commission made the order above quoted. This last order was a final dismissal

> of the complaints and a refusal to take any action with respect to rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court.

We submit that the conclusion thus expressed by Judge Woods is sound.

II. WHAT IS A FAIR AND JUST DISTRIBUTION OF CARS BETWEEN MINES, WHEN THE AVAILABLE SUPPLY IS NOT SUFFICIENT TO MEET ALL REQUIREMENTS, IS A QUESTION FOR THE ADMINISTRATIVE DISCRETION OF THE COMMISSION.

It is clear that a joint mine, and a local mine as well, has a statutory right to a fair share of the available cars in times of car shortage; but the law does not prescribe the rules which shall govern the distribution. The statute does not furnish a certain answer to the question: How many cars is a given mine entitled to on a given day under given circumstances? The answer must be supplied by the Commission. A similar situation is presented in respect of rates. The law requires that rates be reasonable, but it is for the Commission to determine what is a reasonable rate, subject only to the well-known limitations which will be referred to later.

(a) The provisions of the statute.

The authority of the Commission over car distribution is to be found in the following provisions of the Interstate Commerce Act:

> Section 3(1). * * * it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any

> undue or unreasonable preference or advantage to any particular person, * * * or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, * * * or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.
>
> Section 15 (1). * * * whenever, after full hearing, * * * the Commission shall be of opinion that * * * any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * * and shall conform to and observe the regulation or practice so prescribed.

The provisions above quoted are sufficient in themselves to give the Commission jurisdiction to determine whether a scheme of car distribution is unlawfully discriminatory and to fix a just and fair method of distribution to be followed in the future. This

court has so held in a long line of cases which will be discussed later.

There are, however, other provisions of the statute which bear upon the Commission's authority over car distribution, and these are set out below to show how complete is the control of this subject which Congress gave to the Commission:

> Section 1(3). * * * The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, * * *.
>
> Section 1(4). It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor. * * *.
>
> Section 1(6). It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 1(10). The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

Section 1 (11). It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

Section 1 (12). It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.

Section 1 (14). The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect

to car service by carriers by railroad subject to this Act, * * *.

See also section 1 (15), (16), (17), relating to the Commission's emergency powers over car service. These provisions have no direct bearing upon this case, but they serve as another indication of the character of control which Congress intended that the Commission should exercise over car service.

(b) This court has repeatedly upheld and explained the Commission's exclusive jurisdiction over the allotment of cars during periods of car shortage.

The Commission's exclusive jurisdiction over the allotment of cars in times of car shortage has been upheld and explained by this court in many decisions.

In *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304, the coal company sought, by suit in a circuit court of the United States, to recover damages from the railroad company for an alleged violation of section 3 of the Act to Regulate Commerce, growing out of the distribution of coal cars to mines. The coal company claimed that the rules in effect were unjust and discriminatory as against it in so far as they provided that private cars and railroad fuel cars would not be considered as a part of the available car supply for purposes of determining the daily allotment of cars to which each mine was entitled. A private coal car is a car owned by a shipper or receiver of coal. The coal company had not obtained a ruling from the Commission as to the reasonableness of the method of distribution to which it objected.

The court stated the law very plainly, at pages 312–313:

> The prohibitions of section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, * * *.
>
> * * * the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn Case, 215 U. S. 481, and in *I. C. C.* v. *Illinois Central*, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.

In *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, the railroad company attempted to set aside an order of the Commission prescribing certain car distribution rules which required that railroad fuel cars should be counted against the mines receiving them, that is to say, that such cars should be considered as a part of the

available car supply, with certain modifications not here important. The railroad claimed that it was beyond the power of the Commission to establish such rules; that the rules would result in discrimination against the mines from which the railroad companies purchased their coal and in other discriminations. The court upheld the power of the Commission and stated that the contentions of the railroad inveighed

> against the expediency of the order;

that they simply assailed

> the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body * * *, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils.

the court said further

> At best these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality.

Baltimore & Ohio R. R. v. *Pitcairn Coal Co.*, 215 U. S., 481. The coal company brought suit in a United States Circuit Court charging that the method followed by the railroad company in distributing its cars in time of car shortage was unfair and discriminatory against the coal company, and praying that the railroad be required for the future to follow certain

rules which were alleged to be fair and in keeping with the rights of the coal company. The rules against which complaint was directed provided that, in rating mines, there should be considered first, the physical capacity of the mines and, second, the previous shipments by the mines during a two-year period,

> the capacity counting as one and the previous shipments as two.

The previous shipments were to be taken from the records of the railroad company during periods when there was no car shortage. After the mines were rated in this manner, certain deductions were made out of the mass of cars before distribution and certain arbitrary allowances were also made. New mines were allotted an arbitrary number of cars for development; railway fuel cars and private cars were deducted. An arbitrary number of cars were assigned to mines on fire, and mines in the vicinity of industries were given special treatment. The rules contained a provision which related to joint mines and provided that the ratings of such mines should be reduced by 50 per cent. It will be seen that this provision limited the allotment of cars by the Baltimore & Ohio to a mine served by another railroad in a much more drastic way than Rule 4 limits the allotment of cars to a joint mine by each carrier serving that mine. The court held that it was not within the power of the court to decide whether or not the car distribution rules described were fair or to prescribe rules for the future; that

the fixing of such rules called for the exercise of administrative discretion by the Commission. The rule relating to joint mines was not particularly discussed.

In *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S., 456, it was said, at pages 468–469:

> The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. *Inter. Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Same* v. *Chicago &c. R. R.*, 215 U. S. 479; *Morrisdale Coal Co.* v. *Penna. R. R.* 230 U. S. 304, 313; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121, 131.

See also *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Pennsylvania R. R.* v. *Sonman Coal Co.*, 242 U. S. 121; *Pennsylvania R. R. Co.* v. *Stineman Coal Co.*, 242 U. S. 298; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247.

(c) The question here presented is not different in character from those presented in cases discussed above; it is an administrative question.

Appellees' claim, as we understand it from their position in the lower court, is that a joint mine has a right as a matter of law, which the Commission can not alter, to obtain cars in accordance with the following rule, or one which would deal even more liberally with them. From one road the joint mine, which we will assume is served by only two railroads, can obtain cars based on its gross daily rating or capacity to produce coal, and from the other line it

can obtain cars on the basis of its gross daily rating minus the tonnage shipped via the first road. We will call this "appellees' rule" for want of a better name. So far as we can learn from reported cases it has never been in effect on any line of railroad.

Appellees' rule is unworkable; it is impossible of practical application. An illustration will make this apparent and also serve to show how complex and essentially administrative are the questions presented in connection with car distribution. Railroad A serves four mines, Nos. 1, 2, 3, and 4. Nos. 1 and 2 are joint mines also served by railroad B; Nos. 3 and 4 are local mines served only by railroad A. Railroad B serves four mines, Nos. 1 and 2, the joint mines served also by railroad A, and Nos. 5 and 6, which are local mines served only by railroad B. Each of the joint mines has a gross daily rating of 100 cars. Each of the local mines has a daily rating of 100 cars.

On a given day railroad A and railroad B each have 200 cars available for distribution. Under the rule which appellees say they are entitled to as a matter of law, a joint mine may order its gross daily rating from one road, either one it chooses, and receive from that road its *pro rata* share of available cars on that basis; and then order from the second road the difference between its gross daily rating and the number of cars it received from the first road, and receive its *pro rata* share of available cars from the second road on the basis of such order. Assume that joint mine No. 1 orders its full gross daily rating from railroad

A and also desires to obtain its *pro rata* share of cars from railroad B; and that joint mine No. 2 orders its full gross daily rating from railroad B and desires also to obtain its *pro rata* share of cars from railroad A. How would the cars be distributed under the rule; what would be the number of cars to which each mine, local and joint, would be entitled?

An attempt to answer the question discloses surprising difficulties. The number of cars which joint mine No. 1 is entitled to receive from railroad A is dependent upon the number of cars which joint mine No. 2 is entitled to order from railroad A; the number of cars which joint mine No. 2 is entitled to order from railroad A depends in turn upon the number of cars which it is entitled to receive from railroad B; the number of cars which joint mine No. 2 is entitled to receive from railroad B depends, however, upon the number of cars which joint mine No. 1 is entitled to order from railroad B, and this depends, as we have seen, upon the number of cars which joint mine No. 1 is entitled to receive from railroad A. This brings us completely around the circle and back to where we started. The same difficulties are encountered in trying to ascertain the distributive shares to which the local mines are entitled because these are dependent upon the shares of the joint mines. An effort to apply the rule to the very simple state of facts we have assumed will make it manifest that its application to actual conditions would be impossible from a practical point of view if not from a theoretical one as well. A railroad may have a hundred or more

mines on its line instead of the four we have assumed; the joint mines served by it may be served by two or more additional carriers instead of one as we have assumed.

If, as is claimed, any rule under which a joint mine would receive fewer cars than under appellees' rule would give to such mine less than the fair share of cars to which it is entitled by law, it would necessarily follow that any rule which would give a joint mine more cars than it would receive under appellees' rule would give a local mine less than the fair share of cars to which it is entitled under the law. The effect of the argument is, therefore, that the law furnishes a certain and definite answer to the question: How many cars is a mine entitled to on a given day, under given circumstances, when the available supply is not sufficient to meet all needs? In other words, a rule, which we have seen can not be applied to actual conditions, is fixed by law and there is no question for the Commission.

But it should be remembered that appellees themselves appealed to the Commission, claiming that Rule 4 was unreasonable and seeking the establishment of what they deemed a reasonable rule. If the subject matter is not within the jurisdiction of the Commission, appellees should have gone to the courts in the first place to enforce their rights and not to the Commission.

The question here is not different in character from the questions which this court held were admin-

istrative questions for the Commission in the *Morrisdale, Illinois Central,* and *Pitcairn* cases, *supra.*

In the *Morrisdale* and *Illinois Central* cases, the question was whether, in distributing cars between mines, private cars and railway fuel cars should be counted against the *pro rata* shares of the mines receiving them and if so, to what extent. Stated another way, the question was whether cars of this character should be treated as a part of the general mass of cars available for distribution; or whether, on the other hand, such cars had a special status in this respect, and if so what that status was. The court held, in effect, that this was not a general question of law for the courts, but was a question for the Commission.

In the *Pitcairn* case it appeared that the mines were rated not alone upon present capacity to produce coal but that past shipments over the Baltimore & Ohio during a two-year period were also considered and given a weight of two as against a weight of one given to present capacity. The court held that it was for the Commission to say whether this was a fair way to rate mines. Certainly, if a mine has no right, which is not subject to the administrative discretion of the Commission, to obtain cars on the basis of its present capacity to produce coal, our case raises no question which is not administrative.

In this connection, it should be pointed out that appellees' position necessarily is predicated upon the proposition, shown to be unsound by the *Pitcairn* case, that joint mines must, as a matter of law, be rated

on their capacity to produce coal. This becomes apparent when it is understood that if a joint mine is given an individual rating over each line which serves it, based on its shipments over that line during an extended period of free car supply, it will receive, during a car shortage period, even if it is given a *pro rata* share of cars by each road based upon 100 per cent of its rating over that road, fewer cars than appellees say it is entitled to receive as a matter of law, and fewer cars than it would receive under Rule 4. An example will make this clear. A joint mine has a capacity, which has remained uniform for two years, to produce 100 cars of coal per day. It is served by two railroads A and B. During the two years its combined shipments over the two roads could not have exceeded 100 cars per day. Assume that it divided its shipments equally between the two roads during the two years. It would then have a rating over each of 50 cars per day. Its combined rating would be 100 per cent of its capacity to ship or the same as the combined or gross rating of a joint mine under Rule 4. It would not, however, be able to obtain cars from one road or the other, at its choice, upon the basis of its combined ratings as it may do under Rule 4. Rule 4 is the more liberal rule.

There are many cases which do not involve car distribution rules but which, nevertheless, are important as indicating the character of questions which call for the exercise of discretion by the Commission

and fall within its exclusive jurisdiction. We will refer to only two such cases.

Loomis v. *Lehigh Valley R. R.*, 240 U. S. 43. A shipper ordered cars from the railroad suitable for the transportation of grain in bulk. He was furnished cars which were inadequate for the required service until fitted with inside doors, and he was therefore compelled to construct the doors himself at a considerable expense. Without resort to the Commission he brought suit in a state court to recover from the railroad the money thus expended. This court held that the question was an administrative one and should have been submitted to the Commission.

Director General v. *Viscose Co.*, 254 U. S. 498. The carrier, having transported silk as freight for many years, amended its tariffs to include silk among articles "that will not be accepted for shipment." The Viscose Company, a manufacturer of silk, filed a bill in a district court of the United States in an effort to enjoin the carrier from refusing to accept its silk for transportation. This court held that the question should have been presented to the Commission.

(d) Sections 22 and 23 are not applicable.

The bill refers to sections 22 and 23 of the Interstate Commerce Act. (Rec. p. 6.) But the provisions of those sections do not detract from what we have said and have no bearing on this case.

Section 22 provides that:

> * * * nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Section 23 provides that the circuit and district courts of the United States may, under stated conditions, issue a writ of mandamus requiring a common carrier to transport traffic or furnish cars to the person seeking the writ, upon terms as favorable as those given for like traffic under similar circumstances to any other shipper.

In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, and the numerous cases which have followed the *Abilene Case*, it was held, after the most elaborate consideration, that section 22 did not have the effect of preserving remedies which were repugnant to the scheme of regulation set up by the statute in that they required courts and juries to pass upon administrative questions confided by Congress to the Commission.

The true meaning of section 23 is clearly explained in *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S., 481. We quote from page 499:

> * * * This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are

so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts.

III. THE COMMISSION'S ACTION WAS NOT ARBITRARY.

When the Commission acts within its legitimate field the courts will not review the wisdom or expediency of its conclusions, or substitute their judgment for that of the Commission. The power to make the order and the wisdom of making it are not to be confused.

Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547; *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 314, 320; *O'Keefe* v. *United States*, 240 U. S. 294, 303; *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, 62; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

Of course the Commission's procedure must be such as to insure a fair hearing; its order must be supported by evidence, and must not be so unreasonable and arbitrary as virtually to transcend its statutory authority. Here no claim is made that the procedure was irregular or that the evidence was

insufficient. Furthermore, if any claim is made that the Commission's action was arbitrary, such claim goes back for its chief, if not its only, support to the contention that the Commission's action resulted in an encroachment upon the "legal rights" of appellees. This we have already answered.

Rule 4 is not arbitrary or unreasonable; on the contrary, it is manifestly fair. The gross daily rating of a joint mine is its capacity to ship over all railroads which serve it. The effect of Rule 4 is to provide an elastic and flexible daily rating for the joint mine over each of the roads. The joint mine may itself fix its daily rating over each road, subject only to the restriction that the combined daily ratings can not exceed its gross rating or daily capacity to produce coal.

Under this rule a joint mine may, in case of car shortage, select the railroad which has the better car supply and receive its *pro rata* share of cars from that line on the basis of its full gross daily rating. If first one road and then another has the better supply, the joint mine may switch its orders accordingly, and thus obtain a better supply of cars, on the whole, than can be obtained by a local mine on any line serving it. Furthermore, it may choose between the carriers for the purpose of avoiding embargoes and congestions of traffic on particular roads. Still further, it has available a more extensive and more varied market for its coal and may at times be able to dispose of its product upon the second line of rail-

road, while the mine local to the first road is unable to market its output.

Rule 4, therefore, does not deprive a joint mine of any of the rights enumerated by the district court as follows (Rec. p. 57):

> The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; * * *.

A rule which would permit a joint mine to obtain cars, in times of car shortage, based on a theoretical tender of more cars than it can produce during the day, involves a duplication of tender. A shipper can not claim a right to tender his goods to two carriers at the same time and obtain cars from each on the basis of such tender. A day is the unit of time used for purposes of car distribution. A joint mine should not be permitted to obtain cars from one railroad on the assumption that it can ship all of its day's output over that line when, as a matter of fact, it ships a large part of the day's output over another line.

It was argued below that Rule 4 required a carrier, serving a joint mine, to discriminate against it because the mine transacted business with a competing carrier. And, to show that this was unlawful, the well known line of cases was cited holding that a carrier can not, as a competitive measure, penalize a man who has used another carrier by refusing to meet his just

demands for service. These cases are not in point; they do not bear upon the question of how much service a shipper is entitled to when all requirements can not be met; and still less do they bear upon any question concerning the power of the Commission to make reasonable rules for the distribution of cars which, after all, is the question in this case.

IV. ANSWERING CERTAIN OTHER POINTS SUGGESTED IN THE BILL.

(a) The bill alleges (Rec. p. 14) that Rule 4 is discriminatory against joint coal mines in favor of shippers of other commodities who are served by two or more railroads. This is alleged as a conclusion of the pleader. There is no definite allegation of what method is followed in distributing cars to such other shippers; no allegation that the method, whatever it may be, in any way affects the cars available for distribution to coal mines; no allegation that conditions surrounding the transportation of other commodities, or any of them, are similar to those surrounding the transportation of coal, or are such as to make definite rules for car distribution either necessary or practicable; no allegation that the alleged discrimination has been the subject of complaint to the Commission which surely is the body to pass upon such a question of alleged discrimination, at least in the first instance.

(b) The bill alleges (Rec. p. 15) that Rule 4 requires two competing carriers to act in combination one with the other in restraint of trade and commerce and in

violation of the laws of the United States. We think the rule clearly does not require any such combination. Its only requirement, in this respect, is that one road, in measuring the amount of service to which a joint mine is entitled from it, when its facilities are not sufficient to meet all requirements, shall not only take into consideration the capacity of the mine to produce coal, but shall also consider, in the manner specified, the fact that the mine is not dependent solely upon it for the transportation of the coal which it can produce. The 150 per cent rule and the rule which appellees say is required by operation of law both demand a similar "combination," if the word can be used in this sense, between carriers serving joint mines.

CONCLUSION.

It may be assumed, for purposes of illustration, if indeed the court cannot take judicial notice of the fact, that some mines are served by three, four, or even five carriers. Certain shippers of other commodities are served by perhaps as many as fifteen carriers. Does the law require that during periods when there is an extreme shortage of transportation facilities, such shippers be permitted to obtain all, or practically all, the transportation they desire and thus greatly decrease the already insufficient facilities available for other shippers? Is the Commission powerless to exercise any discretion in such a situation?

We submit that the district court should be reversed and the case remanded with instructions that the injunction be dissolved and the bill dismissed.

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MARCH, 1924.

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